

ESTTA Tracking number: **ESTTA520649**

Filing date: **02/08/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91207992
Party	Defendant Cheo Green
Correspondence Address	THOMAS K RICHARDS 249 SKILLMAN AVE BROOKLYN, NY 11211 UNITED STATES trichards1975@gmail.com
Submission	Other Motions/Papers
Filer's Name	Thomas K. Richards
Filer's e-mail	trichards@traffek.com
Signature	/Thomas K. Richards/
Date	02/08/2013
Attachments	MOTION TO SET ASIDE DEFAULT - ELLE JOLIE.pdf (3 pages)(317491 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

-----X

In Re: Application of

Cheo Green

Application Number 85383850

Published July 17, 2012

Trademark: ELLE JOLIE

-----X

HACHETTE FILIPACCHI PRESSE,

Opposer,

-against-

CHEO GREEN,

Applicant.

-----X

MOTION TO SET ASIDE NOTICE OF DEFAULT AND FOR LEAVE TO FILE ANSWER

Applicant, Cheo Green, an individual with his address at 163 E. Main St, Little Falls, New Jersey, 07424 (hereinafter "Applicant"), hereby files this Motion to Set Aside the Notice of Default entered January 15, 2013 in connection with U.S. Trademark Application No. 85383850 for the mark ELLE JOLIE (the "Default"). Applicant was never served by mail with the Notice of Opposition filed by Hachette Filipacchi Presse ("Opposer") on November 14, 2012 (the "Opposition"). Therefore, Applicant requests that the Default be set aside and that Applicant be permitted to file an Answer to the Opposition.

I. The Motion to Set Aside the Notice of Default if for Good Cause

The standard for setting aside a Notice of Default is good cause. Good cause for

Failure to file a timely answer is generally found when (1) the delay in filing the answer to was not the result of willful conduct or gross neglect on the part of the Applicant; (2) the Opposer will not be substantially prejudiced by the delay; and (3) the Applicant has a meritorious defense to the Opposition. *TBMP* §312.02. Applicant satisfies all of these elements.

A. Applicant's Delay in Filing the Answer was not Willful and did not Constitute Gross Neglect.

The Opposition was filed electronically on November 14, 2012. Opposer forwarded an email purporting to have sent a copy of the Opposition by email to counsel for Applicant. However, Applicant did not consent to electronic service. The certificate of service indicates that the Opposer served a copy of the filing via first class mail. However, Applicant was never in receipt of the Opposition by mail.

Pursuant to 37 C.F.R. §2.101(a) an opposition proceeding is commenced by filing a timely Notice of Opposition with the required fee. Service may be effectuated by electronic transmission, such as email or facsimile, only when **mutually agreed upon by the parties**. As stated above, Applicant did not receive service by mail of the Opposition nor did Applicant's counsel. Although Opposer's affidavit of service indicates service by mail upon Applicant, proof of service assumes actual service upon the Applicant. *Springfield Inc. v. XD*, 86 USPQ2d 1063, 1064 (TTAB 2008). Accordingly, Opposer's service did not comply with 2.119, and the opposition should not have been instituted.

In view of the foregoing, Applicant's failure to timely answer was not willful and did not constitute gross negligence.

B. The Opposer will not be Substantially Prejudice by the Delay

In this case, the Opposer will not be prejudiced by the delay in response. Applicant's delay in responding to the Notice of Opposition has not caused Opposer to expend any time, money or resources to compel Applicant's Answer. If the Board sets aside the Notice of Default, Opposer will have ample opportunity to make its case. Further, Applicant's delay in filing its Answer is due in part to Opposer's apparent failure to effectuate proper service and satisfy the requirements for instituting an opposition proceeding. Accordingly, it is submitted that Opposer has not been and will not be substantially prejudiced.

C. Applicant has a Meritorious Defense to the Notice of Opposition

The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint. *TBMP* §312.02. Applicant has a meritorious to the Opposition in that ELLE JOLIE and ELLE are not substantially similar and there is not likelihood of confusion between these two marks.

D. Applicant Requests Leave to File its Answer

Applicant believes Opposer has failed to properly serve Applicant pursuant to 37 C.F.R. 2.101 and 2.119. Applicant respectfully requests that the Board grant Applicant leave to file its Answer.

WHEREFORE, Applicant respectfully prays that the Motion to Set Aside the Notice of Default and for leave to file the Answer be granted.

Respectfully Submitted,

THOMAS K. RICHARDS

Dated: February 8, 2013

By: /s/Thomas K. Richards/

249 Skillman Ave., #2
Brooklyn, New York 11211
trichards@traffek.com